In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-128

ADOLPH COORS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 497 F. 2d 1178. The opinion of the Federal Trade Commission (Pet. App. B9-B59) is not yet reported. The initial decision of the hearing examiner (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1974. The petition for a writ of certiorari was filed on August 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission correctly held that restraints imposed by a manufacturer, as part of a resale price maintenance scheme, upon the territories in which its distributors and retailers may sell its product, constitute unfair methods of competition or unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

2. Whether the court of appeals properly applied the "substantial evidence" test in this case.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, is set forth in relevant part at Pet. App. D7-D11.

STATEMENT

Petitioner ("Coors") seeks review of a decision by the court of appeals affirming an order of the Federal Trade Commission (the "Commission"). The order directs Coors to cease and desist from imposing upon the distributors and retailers of its beer various restraints concerning prices, territories and customers.

On June 7, 1971, the Commission issued a complaint under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, alleging that Coors' marketing practices were anticompetitive and unfair. Coors admitted allocating exclusive territories to its distributors, but denied generally the other allegations. After full hearings, the administrative law judge rendered his initial decision finding no violation and recommending dismissal of the complaint (Pet. App. C1-C182).

On complaint counsel's appeal the Commission reversed the initial decision and entered a cease-and-desist order (Pet. App. B9-B59). It found that Coors "has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level * * *" (Pet. App. B32). Because Coors' system of territorial restraints involved price fixing, the Commission ruled (Pet. App. B33-B39) the entire arrangement illegal *per se* under *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 373. The Commission also found that Coors had violated Section 5 by encouraging exclusive draught beer accounts, discouraging sales by its distributors to central warehouse accounts, and abusing the termination provisions in its contracts with distributors in order to coerce anti-competitive behavior (Pet. App. B39-B58).

The court of appeals concluded that the Commission's findings were supported by substantial evidence and sustained eleven of the thirteen provisions of the Commission order (Pet. App. A1-A19).[1] The court agreed with the Commission that the price, territorial and customer restraints that Coors imposed were illegal (Pet. App. A12-A15).

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[1] The majority (Pet. App. A16-A18), Judge Holloway dissenting (Pet. App. A20), set aside paragraph 12, which would have altered Coors' distributor contracts by increasing the notice requirements for termination with cause from five to 60 days, and without cause from 30 to 180 days, and paragraph 13, which required that Coors submit termination disputes with its distributors to arbitration. The Commission is filing a petition for a writ of certiorari to review the reversal of those two paragraphs of its order.

ARGUMENT

The decision of the court of appeals concerning the first eleven paragraphs of the Commission's order is correct and the petition raises no issue warranting review by this Court.

1. Coors argues (Pet. 7-14) that the court of appeals has misinterpreted *United States* v. *Arnold, Schwinn & Co., supra*, and has not applied the correct criteria in determining the legality of vertically-imposed territorial restraints. The discussion from *Schwinn* on which Coors relies (Pet. 8-9), however, deals with distribution under a consignment plan in which the manufacturer retained complete ownership of its product and assumed the risk of loss. See 388 U.S. at 380, 381. In *Schwinn* this Court distinguished situations like the present case, "where the manufacturer parts with title, dominion, or risk with respect to the article * * *." *Id.* at 378-379.

The court of appeals cases that Coors cites do not conflict with the interpretation of *Schwinn* by the court below. None disputes the Commission's conclusion that *Schwinn* establishes that vertically-imposed territorial restraints that are part of a price-fixing scheme are unlawful.[2]

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[2]In *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F. 2d 398, 406-407 (C.A. 2), certiorari denied, 393 U.S. 938; *Colorado Pump & Supply Co.* v. *Febco, Inc.*, 472 F. 2d 637, 639-640 (C.A. 10), certiorari denied, 411 U.S. 987; and *Norman M. Morris Corp.* v. *Weinstein*, 466 F. 2d 137, 143 (C.A. 5), the courts found that the elements of illegality had not been established. In *Janel* and *Colorado Pump* the evidence did not satisfy the requirement that the manufacturer be " 'firm and resolute' in insisting upon observance of territorial * * * limitations * * *." *Schwinn, supra*, 388 U.S. at 372. In *Morris*, a trademark case, the agreement in question did not bar the distributor from selling in other territories.

The decision below does not conflict with any decision of the Commission. No question regarding the legality of territorial restraints was involved in *Universal Electronics Corp.*, 78 F.T.C. 265, rehearing denied, 78 F.T.C. 1576, cited by Coors as evidence that the Commission has adopted a different interpretation of *Schwinn* (Pet. 11). That was a deceptive advertising case in which the Commission ordered respondent to cease representing that a distributor was guaranteed an exclusive territory.[3]

Coors also suggests that this Court reconsider *Schwinn* insofar as it may be construed to declare illegal *per se* all forms of vertical territorial allocation. Assuming *arguendo* that *Schwinn* reaches that broadly, and that so recent a decision should be reexamined, the question is not presented on this record. This case does not involve a vertical territo-

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Tripoli Co. v. *Wella Corp.*, 425 F. 2d 932, 936-939 (C.A. 3), certiorari denied, 400 U.S. 831; *Carter-Wallace, Inc.* v. *United States*, 449 F. 2d 1374, 1379-1382 (Ct. Cl.); and *Anderson* v. *American Automobile Ass'n*, 454 F. 2d 1240, 1244 (C.A. 9), did not involve territorial restraints in the sale of a product. In *Tripoli* sales of hazardous products were restricted to licensed professionals. The price differential based on different proposed uses of a drug in *Carter-Wallace* did not impose any absolute restraint on the use of the drug. In *Anderson* a purchaser of towing services assigned service territories to the stations that contracted to provide the services.

[3]The quotation from the Ad Hoc Committee relied upon by Coors (Pet. 11) relates to consignment plans and has not been adopted or formally approved by the Commission. Similarly, Mr. Halverson's testimony (see Pet. 12-13) explicitly represented "only the views of a member of the Federal Trade Commission Staff" (Pet. App. E1), and had not been "passed upon or approved" by the Commission or any individual Commissioner (*id.* at E2).

rial restraint unaccompanied by other anticompetitive behavior. The territorial restraints here are part of a price-fixing scheme. See *Schwinn, supra*, 388 U.S. at 373-376; *United States* v. *Sealy, Inc.*, 388 U.S. 350, 354-358; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 724. Furthermore, this is not an action under Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, but a proceeding pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, which is substantially broader in reach. See *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244.

2. Coors claims (Pet. 15-20) that the court of appeals misapplied the substantial evidence test by considering only those portions of the record tending to support the Commission's order and disregarding all evidence to the contrary. This claim is factually inaccurate. The court of appeals stated that it had examined the record and found "substantial evidence from the record as a whole to support the Commission's findings * * *" (Pet. App. A10; accord, *id.* at A12, A15, A16).[4] In any event, the question whether the court of appeals properly applied the substantial evidence test in this case does not warrant review by this Court.

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[4]The court of appeals also observed (Pet. App. A9-A10):

> [T]he findings and conclusions of the Law Judge * * * are part of the record to be considered on appeal. *OKC Corp.* v. *Federal Trade Commission*, 455 F. 2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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NOVEMBER 1974.

[5]Because of the unrelated nature of the questions presented by Coors' petition and by the Commission's petition (see p. 3, *supra*, n. 1), there would be no need for the Court to grant Coors' petition if it were to grant the Commission's petition.